the circumstance which caused the reduction in damages occurred after the conversion does not seem material. *Waters* v. *Stevenson*, 13 Nev. 157. They go rather on the ground that the general rule of damage would give the plaintiff more than compensation. For these reasons a result different from that reached in the principal case would seem to be preferable both in point of justice and as a matter of theory.

On principle the same result should be reached in case the taking were wilful, but the courts would ordinarily give the value at the time of conversion as a punishment to the wrongdoer.

IMPLIED WARRANTY AGAINST LATENT DEFECTS. — It is frequently stated that a vendor impliedly warrants the merchantability of goods sold to a purchaser who has no opportunity to examine them. It is doubtful, however, whether this warranty extends to defects not discoverable by examination. A recent English case, decided under the Sale of Goods Act, suggests the question how far the law will imply a warranty against such latent defects. The plaintiff was poisoned by some beer which he bought from the defendant, a retail seller. The presence of the poison which the beer contained could have been detected only by a skilful chemical test. Yet it was held that there was an implied warranty by the defendant that the beer was fit to drink. *Holt* v. *Wrenn*, 19 T. L. R. 292 (Eng., C. A.).

There is an apparent conflict on the subject of warranties against latent defects, owing to a failure to distinguish between warranties implied in law and warranties implied from the description of the goods sold. Where, for instance, grain is sold as "No. 2 White Wheat," there is a warranty that the grain sold agrees with the description. *Whitaker* v. *McCormick*, 6 Mo. App. 114. This is often called an implied warranty, but, since it arises only from the words used by the parties, it is in its nature rather express than implied. For that reason it is rightly held to cover latent defects. *Wolcott* v. *Mount*, 38 N. J. Law 496. But with regard to a warranty of merchantability, which is a true implied warranty, American courts have drawn a sharp distinction between sales by a dealer and sales by a manufacturer. The manufacturer is held to warrant against all defects, whether they are discoverable by examination or not. *Rodgers* v. *Stiles*, 11 Oh. St. 48. The dealer is held to warrant only against discoverable defects. *White* v. *Oakes*, 88 Me. 367.

Whether there is sufficient difference between the two to justify the distinction may well be doubted. The situation of the dealer differs from that of the manufacturer, if at all, only in that the former has not so great an opportunity to obviate or detect the defect. But, while this difference might have its bearing on the dealer's tort-liability for negligence, it does not necessarily mean that he has impliedly promised less. An implied warranty is arrived at by reading into the contract a stipulation which it does not contain, but which the parties would have inserted, had their attention been directed to the possibility of a defect. In determining what this stipulation must be, the true test is what the generality of mankind would regard as fair under the circumstances. The ordinary purchaser would certainly expect to get as good an article from the dealer as from the manufacturer for the full price he has paid. And on the other hand it is no hardship on the dealer to make good the deficiency in an article for which he has received full value. True, if a warranty be implied the dealer might be liable for large collateral

damages. *Passinger* v. *Thorburn*, 34 N. Y. 634. But these are suffered only in comparatively few instances; the hardship of the rule is no greater on the dealer than on the manufacturer, who is presumably not negligent; and the dealer has his remedy over against his vendor on the latter's implied warranty. For these reasons it is believed that the modification of the doctrine of *caveat emptor* by the Sale of Goods Act, by which all sellers impliedly warrant the merchantability of goods sold, is worthy of legislative imitation as the just and more politic rule.

PROVOCATION IN MITIGATION OF DAMAGES. — Evidence of provocation is admitted everywhere in mitigation of punitive damages. *Kiff* v. *Youmans*, 86 N. Y. 324; *Ward* v. *Blackwood*, 41 Ark. 295. Obviously the more a defendant acts under provocation, the less is he deserving of punishment. Furthermore, to give a plaintiff a fine made necessary partly by his own conduct would place a premium upon inciting the commission of torts.

The mitigation of compensatory damages on account of provocation, however, presents a question upon which the decisions are in confusion. Many courts refuse altogether to allow such mitigation, holding that to do so would be to violate the well established principles that mere words cannot justify an assault, and that one who has been injured by another without legal justification can recover for the loss which he has suffered. *Goldsmith* v. *Joy*, 61 Vt. 488; *Fenelon* v. *Butts*, 53 Wis. 344. Of those courts which allow the mitigation of compensatory damages, some do so for the same reason for which they allow the mitigation of punitive damages, overlooking the distinction that punitive damages are exacted only by way of punishment, while compensatory damages are given merely to recompense for actual loss. *Fraser* v. *Berkeley*, 7 C. & P. 621. Others adopt a ground which may be best described as a sort of "moral set-off," the defendant being allowed to balance his ethical claims against the legal claims of the plaintiff. *Burke* v. *Melvin*, 45 Conn. 243. In still others it has been vaguely suggested that the doctrine of punitive damages should be mutual, that it should apply to the conduct of the plaintiff as well as to that of the defendant. *Robison* v. *Rupert*, 23 Pa. St. 523.

This last suggestion would seem to embody the correct principle. Through punitive damages the community punishes the defendant by making him pay more than is necessary to compensate the plaintiff; through mitigation of damages it punishes the plaintiff by giving him less than will compensate him for the loss which he has suffered. In both cases a penalty is placed upon the wrongdoer primarily to punish him, and this is given to the other party only incidentally for reasons of convenience. See SEDG. DAM. 8th ed. § 352 f. On this ground it is believed that a recent New York case which extends the doctrine of *Kiff* v. *Youmans*, *supra*, to the mitigation of compensatory damages was correctly decided. It carries out consistently the New York attitude as to punitive damages. *Genung* v. *Baldwin*, 77 N. Y. App. Div. 584. Since mitigation of damages is only punitive damages in another form, the above reasoning does not apply to states in which the doctrine of punitive damages is repudiated. There the arguments that criminal and tort liability should not be confused, and that an action fitted for securing compensation for private injury is not adapted to punishing public wrong, would be applied equally to both forms of punitive damages. *Mangold* v. *Oft*, 88 N. W. Rep. 507 (Neb.).